Supreme Court, U.S.
FILED

011575 JAN 29 2002

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No.

In The

SUPREME COURT OF THE UNITED STATES
October Term, 2001

WALTER BURRIER

Petitioner

versus

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Respondent

AND

JOSE RAUL BLANCO AND REFUGIO DEL CARMEN GARCIA HERNANDEZ

Real Parties in Interest

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Do undocumented aliens have standing in a state court to contest the standard of legal representation given to them in a Federal Immigration Forum, where the attorney is not a member of that state bar and practices only federal law?

2. Do undocumented aliens, who have been banned from the United States, have standing to file any action in any court within the United States?

LIST OF PARTIES

The parties herein are:

Walter Burrier.....Petitioner

The Superior Court of the State of California For the County of
Los Angeles.....Respondent

Jose Raul Blanco and Refugio Del Carmen Garcia Hernandez.....Real Parties in Interest

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JOSE RAUL BLANCO AND REFUGIO DEL CARMEN GARCIA HERNANDEZ *Real Parties in Interest.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

OPINIONS BELOW

The opinion sought to be reviewed is that of the Supreme Court of California in *Burrier vs. Los Angeles Superior Court*, 2001 (Court Number S101063) entered October 32, 2001. The decision

of the Supreme Court was not officially reported. The Supreme Court is the highest California appellate court.

The Supreme Court case was an appeal from The California Court of Appeals in *Burrier vs. Los Angeles Superior Court*, 2001 (Court Number No. B152987) entered September 20, 2001. The decision was not officially reported. The California Court of Appeals decision was an appeal of the trial court in *Jose Raul Blanco, et. al. vs. Walter Burrier, et. al.* 2001 (Court Case No. BC 249933) ruling entered on September 6, 2001. The decisions of the Trial Court are not officially reported.

JURISDICTION

This is a case arising under The Immigration and Naturalization Act 8 U.S.C. Section 1158.

A petition for review was filed by the petitioner, October 1, 2001 before The Supreme Court of California.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 10 of the Supreme Court of the United States of America and 8 U.S.C. section 1329.

Additionally as 28 U.S.C. section 2403 (b) applies the petitioner is serving a copy of this petition on the Attorney General of California.

STATUTE

The statute primary to this case is the Immigration and Naturalization Act, 8 U.S.C. section 1158.

STATEMENT OF THE CASE

The California Superior court, as upheld by the appellate courts, allowed a malpractice action to continue against an attorney, licensed in Connecticut, but not California, for alleged malpractice in a United States Immigration Court. The California courts were not concerned that the defendant attorney has never practiced in California courts and that the plaintiff aliens have been permanently banned from the United States by the Immigration court after exhausting all appeals available in that court.

ARGUMENT

A. Facts

The plaintiffs were and are citizens and residents of the country of El Salvador, who entered the United States illegally without inspection, prior to March 1998. They sought to legalize their status in the United States, in Los Angeles California and they sought the services of a non attorney Carlos Quintanilla, a named

defendant in the lower court action, who has not yet been served and is not yet a party herein.[1]

The plaintiffs through Quintanilla claimed political asylum pursuant to 8 U.S.C. 1158, and 8 C.F.R. 208. They filed a U.S. Department of Justice Form "I-589" with the Immigration and Naturalization Service in pursuit of their claim of political asylum. Under United States law a claim for political asylum is also considered a claim for "withholding of removal" under 8 C.F.R. 208.1(a).

The plaintiffs' claims followed standard immigration review, not at issue herein, until their claims reached the Immigration Court in Los Angeles, California. The plaintiffs were represented at all times before that immigration court, by the petitioner, a licensed attorney in the state of Connecticut, who practices federal immigration law and has an office in California. The plaintiffs claim they first met the petitioner in August of 1998.

The petitioner is authorized to practice before the Immigration Court, Executive Office of Immigration Review under 8 C.F.R. section 1.1(f) and 8 C.F.R. section 292.1(a)(1) and subject to discipline under 8 C.F.R. section 292.3

The plaintiffs had a political asylum hearing on or about July of 1999. At that hearing the

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[1] A claim against Quintanilla was made under a statute in California regulating "immigration consultants" which is not the subject of the action reviewed herein.

Federal Immigration Judge determined that the plaintiffs were not entitled to any relief, including political asylum and withholding of removal.

Further the court specifically held that the plaintiffs had filed a "frivolous" application under 8 U.S.C. 1158 (d)(6). Under the law, asylum applicants who have made a "knowingly" frivolous application for asylum are permanently ineligible for any benefits. In effect they are banned for life.

The plaintiffs filed a motion to re-open the matter with the Immigration Court based on ineffective counsel, which was denied. All Immigration appeals having been exhausted, the prior finding of a frivolous asylum was determined a final ruling.

Nevertheless, on July 13, 2001, plaintiffs obtained their current counsel and filed an action in California Superior Court, Case No. BC249933, against Walter Burrier and Carlos Quintanilla claiming damages for fraud and denial of immigration benefits through malpractice.

Petitioner retained the services of Stephen J. Alexander, an attorney licensed in the state of California, (but not before the United States Supreme Court), to represent him in the lower court actions. Pursuant to California law, California Code of Civil Procedure 410.30, the petitioner filed a special motion to dismiss on forum inconvenient grounds. The petitioner through counsel, specially appeared contesting jurisdiction, both personal and subject matter

jurisdiction, and agreeing to jurisdiction in either Connecticut or in the Federal District court.

The trial court denied the motion on September 6, 2001. Pursuant to California law, the denial of the motion not being a final judgment, and by California Code of Civil Procedure 418.10, a Writ of Mandate was filed on September 17, 2001 Case No. B152987 . Said Writ was summarily denied on September 20, 2001. A petition for review was then filed by the petitioner on October 1, 2001 before The Supreme Court of California, the highest California appellate court, Case No. S101063. That petition was also summarily denied on October 31, 2001. Through a Petition, a Writ of Certiorari before the United States Supreme Court is now requested.

The Supreme Court of California is the highest California State Court and appeal to the United States Supreme Court is appropriate as all lower court relief has been exhausted

Jurisdictional issues including the federal subject matter jurisdiction were raised in the state trial court by motion and through all stages of appeal.

B. California Lacks Subject Matter Jurisdiction

The authority of Congress and the Federal Government to control immigration and foreign

relations comes directly from the United States Constitution. The United States Constitution gives the Congress the power to regulate commerce with foreign nations, to establish uniform rules of naturalization, to provide for the general welfare, and to make all laws necessary and proper to carry out its powers. These specific powers are found in The United States Constitution Section 8, Clause 1, The United States Constitution Section 8, Clause 3, The United States Constitution Section 8, Clause 4, and The United States Constitution Section 8, Clause 18. The power of the Federal Government in foreign affairs was also upheld in *United States v. Curtiss-Wright Corp.* 299 U.S. 304 (1936).

The Federal Government, the United States Congress, has the authority to regulate the practice of immigration. A state's power to regulate or restrict the practice of law before a federal Court, must yield to federal law. The United States Supreme Court in *Sperry v. Florida* 373 U.S. 379 (1963) so held. In Sperry, the petitioner was not an attorney, but practiced before the United States Patent Office located in Florida. The state of Florida obtained an injunction to prevent the petitioner from appearing before the Patent Office, as he was "engaged in the unauthorized practice of law" within the state of Florida.

The court held that Sperry did engage in the unauthorized practice of law as defined by

Florida and that Florida's police powers did permit the state to regulate the unauthorized practice of law. Yet, despite the interest of Florida in protecting its citizens the court held that Florida's law must yield to the Federal Government. Citing *Gibbons v. Ogden* 9 Wheat 1,211 the court stated "But 'the law of the State, though enacted in the exercise of powers, not contraverted, must yield' when incompatible with federal legislation...." *Sperry v. Florida* 373 U.S. 379 (1963)

The court stated clearly that no state could regulate a person granted a right to practice before a Federal Board. The court cited *Pennsylvania c. Wheeling & Bridge Co.* 13 How. 518, 566

> "The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by nonlawyers, And the Commissioner has explicitly granted such authority. If authorization is unqualified, then by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing

> requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress"

Sperry v. Florida 373 U.S. 379 (1963)

Once it has been determined that Congress has the power to regulate Immigration and Naturalization and that the police power of the State must yield to Congress, it must be determined whether or not Congress did in fact intend to pre-empt State law and prohibit malpractice actions, with regard to immigration, within state court. A leading case on pre-emption is *Medtronic v. Lohr* 518 US 470, 64 U.S.L.W. 4625 (1996). The US Supreme Court held that for pre-emption to apply, the Federal Statute's language must show a "clear and manifest" purpose to pre-empt. The specific state action must threaten to interfere with a specific federal interest.

The US Supreme Court has also decided a pre-emption case in which a common law tort

action not specifically mentioned in Federal Law was pre-empted by the legislative scheme. In *Cipollone v Liggett Group* 505 U.S. 504 (1992) the plaintiff brought a tort action against cigarette manufacturers, claiming they failed to warn him about the hazards of smoking. The defendant manufacturers claimed that any action under a state tort action was pre-empted by the Federal labeling requirements. The court determined that the federal language that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising ...of cigarettes ... of which are lawfully labeled.", pre-empted the State court tort actions.

Viewing the law as applied to the facts herein, the Congress has passed significant legislation and regulation concerning immigration and the practice within the Immigration Court. Pursuant to Federal regulations the Federal government has set up a specific statutory scheme concerning exactly who may appear as a representative of another before the Executive Office for Immigration Review. 8 C.F.R. section 1.1(f) permits attorneys to appear, regardless if they are licensed in the state where the court is located. 8 C.F.R. section 292.1(a)(2)-(5) provides for law students, reputable individuals, accredited representatives and accredited officials to appear. These individuals are all nonattorneys. If the federal law permits and regulates appearances, then common law actions for malpractice against

attorneys must also be pre-empted by law and any state action must be prohibited.

C. United States Law Bans Malpractice and Other Private Actions under Asylum Law

Under Federal law 8 U.S.C. section 1158 (d)(7) no private action is permitted or created by the political asylum statute.

D. California Lacks Personal Jurisdiction over both the Plaintiffs and Petitioner

The US Supreme Court has held that for personal State jurisdiction to apply a party must have "minimum contacts" with the forum state "such that the maintenance of the suit does not offend `traditional notions of fair play and substantial justice" held in *Shaffer v. Heitner* 433 US 186 (1977)applying *International Shoe Co. v. Washington*, 326 US 310 (1945). Mere presence in the forum state is not enough.

In this case the petitioner has little else then physical presence in the forum state. The petitioner is a Connecticut attorney and has no license to practice law in the California courts. His practice is strictly limited to Immigration law in several states with an office in California. Nothing

the petitioner has done avails him of any benefit in California and California has no interest in regulating his practice in courts which involve no California law or citizen. Even under California law, foreign attorneys are to be sued within their home state under their home state standard, *Credit Lyonais Bank Nederland v. F.L. Amhurst* 202 Cal. App. 3d. 1424, 249 Cal.Rptr. 559 (Cal.App.2 Dist. 1988).

California also lacks personal jurisdiction over the plaintiffs herein. The plaintiffs have legally been determined to have filed a frivolous asylum application and are permanently banned under 8 U.S.C. 1158 (d)(6). They can have no "presence" of any kind within the United States. The finding of frivolousness is final, with all appeals having expired. They are subject to immediate and permanent expulsion. No action by any California court can overrule the federal court's order physically removing the plaintiffs from the United States. The presence of the plaintiffs in the forum state is a clear violation of Federal law. The state trial court, the only court to rule on the merits of the jurisdictional arguments, held that the petitioner must wait until the plaintiffs are in fact physically removed before the action may be dismissed. This is an issue of first impression, but clearly logic dictates that if the plaintiffs have lost all legal status in the United States, their physical removal is not required for a finding of absence from the forum state.

If the plaintiffs are seeking this state action to avoid the removal consequences and not solely to obtain damages, they must resolve their issues within the federal court. Only a federal judge would have the power, if such power exists, to stay a permanent removal of the plaintiffs.

There being no personal nor subject matter jurisdiction within the California courts, the petitioner requests that this court grant Certiorari and dismiss the action pending within the California State court.

CONCLUSION

There being neither subject matter nor personal jurisdiction against the defendant petitioner in California, this court should grant the writ and dismiss the California action pursuant to law.

REASONS FOR GRANTING THE WRIT

This case should be reviewed because it will prevent a California Court from exceeding its jurisdiction into United States Immigration Law. It will avoid the unnecessary expense and judicial waste of resources by ending an improper grant of judicial power over matters never entrusted to a state of the United States. The California action is an attempt by aliens lawfully prohibited from

entering the United States, to override a federal order and remain in the United States. Further it is an attempt to bring discipline, via California Courts, an attorney who has never been licensed nor appeared in California Courts.

Dated this 19th Day of April, 2002

Walter Burrier
In Pro Per